

AL-MAJALLA AL AHKAM AL ADALIYYAH (The Ottoman Courts Manual (Hanafi))

BOOK III. GUARANTEE.

INTRODUCTION

TERMS OF ISLAMIC JURISPRUDENCE RELATING TO GUARANTEE.

- 612. A guarantee consists of the addition of an obligation to an obligation in respect to a demand for a particular thing. This is to say, it consists of one person joining himself to another person, and binding himself also to meet the obligation which accrues to that other person.
- 613. A personal guarantee is constituted by a person becoming a guarantor for another man personally.
- 614. A guarantee of property is constituted by a person becoming guarantor for the payment of something.
- 615. A guarantee for delivery is constituted by a person becoming guarantor for the delivery of something.
- 616. A contingent guarantee is constituted by a person becoming guarantor for the payment of the price of the property sold, in the event of its being appropriated by a person having a right thereto, or for the vendor personally.
- 617. An unconditional guarantee is a guarantee constituted independently of any condition or of any future time.
- 618. A guarantor is a person who adds an obligation of his own to that of some other person. In other words, a person who undertakes to do a thing which some other person has undertaken to do. The latter person is called the principal, or the person guaranteed.
- 619. The person in whose favour the guarantee is made is the person demanding the guarantee and who is the creditor.
- 620. The subject matter of the guarantee is the thing which the guarantor undertakes to hand over or pay. In the case of a personal guarantee the person guaranteed and the subject matter of the guarantee are one and the same thing.

CHAPTER I. THE CONTRACT OF GUARANTEE.

SECTION I. FUNDAMENTAL BASIS OF A CONTRACT OF GUARANTEE.

- 621. A guarantee may be concluded and become executory by the mere offer of the guarantor. The person in whose favour the guarantee is made declines to accept such guarantee. Until such time as he does so, however, the guarantee is valid. Thus, if in the absence of the person in whose favour the guarantee is made, a person stands security for the latter recovering any amount due to him, and the creditor dies without receiving information that such person has stood security, the guarantor is bound thereby.

- 622. The offer of the guarantor, that is, words used importing guarantee, are any words which by custom are evidence of an undertaking to be bound.

Example:- A states that he has stood security, or that he is a guarantor, or that he is ready to indemnify someone. A valid contract of guarantee is thereby concluded.

- 623. A contract of guarantee may also be concluded by means of a promise dependent on a condition. (see Article 84).

Example:- A tells B that he will stand security for the payment of any sum due to B in the event of B not receiving payment thereof. A valid contract of guarantee is thereby concluded, and if the person in whose favour the guarantee is made claims the sum due to him, and the debtor fails to pay, such person may demand payment from the guarantor.

- 624. Should a person undertake to be a guarantor for any limited period of time, a contract of guarantee of limited duration is thereby concluded independently of any condition or of any future time.

- 625. In addition to the conclusion of an unconditional contract of guarantee, a contract of guarantee subject to a condition for immediate or future performance may also be concluded. That is to say, a guarantee may be concluded for payment forthwith or at some future date.

- 626. A person may validly be a guarantor of a guarantor.

- 627. There may also be more than one guarantor.

SECTION II. CONDITION ATTACHING TO A CONTRACT OF GUARANTEE.

- 628. In order to be able to make a contract of guarantee, a surety must be of sound mind and must have arrived at the age of puberty. Consequently, a madman, an imbecile and a minor cannot make a valid contract of guarantee. If a minor becomes a guarantor while a minor and after arriving at the age of puberty ratifies the contract of guarantee, he cannot be made to abide thereby.

- 629. It is not essential for the person guaranteed to be of sound mind, nor to have arrived at the age of puberty. Consequently, a valid contract of guarantee may be entered into in respect of the debt of a madman or a minor.

- 630. If the subject matter of the guarantee is a person, the identity of such person must be clearly established. If it is property, however, there is no need for such property to be identified. Consequently, if a person becomes guarantor for the debt of another owing to some third person, the amount of such debt being unknown, a valid contract of guarantee is concluded.

- 631. In the case of a guarantee of property, the obligation must fall upon the principal debtor, that is to say, the performance of such obligation must be binding on the principal debtor. Consequently, a valid contract of a thing sold, rent and other proved debts. Similarly, a valid contract of guarantee may be concluded with regard to property which has been wrongfully appropriated, and on demand, the guarantor is bound to make good the same in kind or in cash. Again, a valid contract of guarantee may be concluded with regard to property bought on approval as to price, provided the price has been fixed. But a valid contract of guarantee cannot be made with regard to any actual property sold before the receipt thereof, because if the property sold perishes while in possession of the vendor, there is no obligation upon him to deliver the actual property sold, since the sale is cancelled, he being merely obliged to return the price thereof if he has received the same. Likewise, a valid contract of guarantee cannot be concluded with regard to property pledged or lent for use, or let on hire or in other cases where property has been entrusted to some third party, the responsibility for which does not fall upon the principal. But a person may validly undertake to be guarantor for the person guaranteed if such things are wasted or destroyed. A valid contract of guarantee may also be concluded in respect to both the property sold and the delivery thereof. Upon demand, the guarantor is bound to deliver such goods, provided there is no right of retention. If they are destroyed, however, the guarantor is in no way liable, just as the death of the person with regard to whom a contract of guarantee has been concluded frees the guarantor from liability.

- 632. No substitution is permissible in criminal punishment. Consequently, no valid contract of guarantee can be concluded in respect to capital punishment and other criminal matters and punishments of a personal nature. But a valid contract of guarantee may be concluded with reference to indemnities for personal injury payable by persons who may have inflicted bodily injury, including blood money payable by a murderer.

- 633. It is not a condition that the person guaranteed should be solvent, since a valid contract of guaranteed should be solvent, since a valid contract of guarantee may be concluded with regard to a bankrupt also.

CHAPTER II. THE CONTRACT OF GUARANTEE.

SECTION I. UNCONDITIONAL, CONDITIONAL AND FUTURE CONTRACTS OF GUARANTEE.

- 634. The effect of a contract of guarantee is a claim. That is to say, it consists of the right of the person in whose favour the guarantee is made to claim the subject matter of the guarantee from the guarantor.
- 635. In an unconditional contract of guarantee, the sum guaranteed may be claimed forthwith if the debt is payable immediately by the principal debtor, and at the expiration of the period prescribed for payment, if payable at some future date.

Example:- A states that he guarantees the debt of B. If the debt is payable forthwith, payment may be demanded by the creditor at once from the guarantor, and if it is payable at some future date, then upon the expiration of the prescribed period.

- 636. Where a contract of guarantee is concluded subject to a condition, or is to take effect at some future date, the guarantor may not be called upon to make payment until the condition has been fulfilled, and the time has arrived.

Examples:-

- (1). A tells B that if C does not pay his debt to B, he will stand security for the debt. A conditional contract of guarantee has been concluded, and if C does not pay his debt when it falls due, payment may be demanded from the guarantor. But no claim may be made against the guarantor until the principal debtor has been asked to pay.
- (2). A tells B that if C steals his property he will make good the loss. A valid contract of guarantee has been concluded, and if B is robbed by C, payment may be demanded from the guarantor.
- (3). A becomes guarantor on condition that when the person in whose favour the guarantee is made makes a claim for payment he shall be given so many days grace. The person in whose favour the guarantee is made entitled to ask for payment at any time whatsoever after the expiration of the period of grace as from the time at which the demand for payment was made. The guarantor has no right of asking for the same period of grace a second time.
- (4). A tells B that he is guarantor for any sum that may be due to him, or for any sum that may be lent by him, or in respect to anything that may be wrongfully appropriated from him, or in respect to the price of anything that he may sell. The guarantor is only liable in the circumstances contemplated, that is to say, when the debt falls due, or when the money is lent, or wrongfully appropriated is proved, or when the property is sold and delivery thereof is given.

(5). A stands security for the appearance of B upon a certain day. No claim may be made upon the guarantor to produce the person guaranteed before the day in question.

- 637. Upon the fulfilment of a condition, all matters in amplification or restriction thereof must also be fulfilled.

Example:- A undertakes to be guarantor of B for the payment of any sum which may be given in judgement against him. B admits that he is in debt for a certain sum of money. The guarantor is not liable to pay the sum of money in question, until judgement has been given by the Court.

- 638. In the case of a contingent guarantee, the guarantor may not be called upon for payment should any person prove that he is entitled to the thing sold, until the Court has given judgement for the return of the price be the vendor.
- 639. In cases of guarantee of limited duration, no demand may be made from the guarantor except during the period of the guarantee.

Example:- A states that he is guarantor for B for a period of one month as from today. A is only liable during that period, and thereafter is discharged from the guarantee.

- 640. After the conclusion of a contract of guarantee, the guarantor cannot withdraw from the guarantee. In the case of a conditional or future contract of guarantee, however, the guarantor can withdraw from the guarantee before the debtor has become liable in respect to any debt.

Example:- A becomes guarantor absolutely for B, either personally or in respect to a debt. A cannot withdraw from the contract. Nor can he withdraw if he states that he will make good any sum which may be owing to C from D, because the debt came into existence before the conclusion of the contract of guarantee, notwithstanding the fact that it was proved after the conclusion of the contract. But if A undertakes to be guarantor for anything which B may sell to C, or for the price of any goods which he may sell, A is responsible to the person in whose favour the guarantee is made for anything sold to C. He may, however, withdraw from the contract of guarantee prior to the sale. And if A states that he has withdrawn from the contract and requests B not to sell to "C and B nevertheless does sell to C, A is not bound as guarantor for the price.

- 641. A person who is guarantor for the return and delivery of property wrongfully appropriated or lent for use and who delivers such property to the owner, may claim indemnification for the cost of transport from the person wrongfully appropriating or borrowing such property for use.

SECTION II. GUARANTEE FOR THE PRODUCTION OF A PARTICULAR PERSON.

- 642. A personal guarantee consists of producing the person guaranteed. Thus, the guarantor must produce the person guaranteed at any time stipulated, in the event of his being called upon to do so. If he produces such person, he is discharged from his obligation. If he fails, he shall be compelled to produce him.

SECTION III. GUARANTEE OF PROPERTY.

- 643. A guarantor is obliged to make good the loss suffered.
- 644. The person claiming under the guarantee has the option of claiming either against the guarantor or against the principal debtor. The exercise of his right against the one in no way destroys his right of claiming from the other. He may claim first from the one and then from the other or from both simultaneously.
- 645. If a person who is guarantor of property has been guaranteed by some third person for any sum for which he may become liable by reason of his guarantee, the creditor may have recourse against whichever one of them he wishes.
- 646. If persons who are jointly indebted on one particular account guarantee each other, action may be taken against any one of them for the whole amount.
- 647. If there are several guarantors of one debt who have become guarantor for such debt separately, action may be taken against any one of them for the whole amount of the debt.

If they become guarantors at one and the same time, action shall be taken against each one for his share of the debt. But if they have also each guaranteed the amount to be paid by the others, each of them is liable for the whole amount of the debt.

Example:- A is guarantor for a debt of one thousand piastres contracted by B. C also becomes a guarantor for the thousand piastres. The creditor can demand payment of his sum from whichever of the two guarantors he wishes. But if the two guarantors jointly guarantee the debt, they are each liable for the half of the sum only. If they each guarantee the amount for which the other is liable, however, they can both be called upon to pay the whole amount of one thousand piastres.

- 648. If there is a condition in the contract of guarantee whereby the principal debtor becomes freed from his liability, the contract is changed into a transfer of debt.
- 649. A transfer of debt subject to a condition that the debtor shall not be freed from the liability is a contract of guarantee. Consequently, if a creditor instructs his debtor to transfer the sum he is owing to some other person on condition that the debtor is to guarantee payment, and he does so, such person may demand payment from whichever of the two he wishes.
- 650. A person who holds property belonging to some other person on trust may validly become the guarantor of that person for the payment of a debt owing by him, on condition that payment shall be made out of such property and the guarantor is then obliged to make payment from such property. If the property is destroyed, the guarantor is not obliged to pay anything. If he returns the property to the owner thereof after becoming guarantor, he is then personally liable.
- 651. If any person guarantees to produce another at a given time and in the event of his failing to do so, guarantees to pay the debt of such person, the guarantor is obliged to pay such debt. In the event of the death of the guarantor, the heirs must produce the person whose appearance is guaranteed at the time agreed upon, or if such person surrenders himself in accordance with the contract of guarantee, the guarantor's property is freed from all liability. If they fail to produce the person guaranteed, or if such person fails to surrender himself, the estate of the guarantor becomes liable for payment of debt. In the event of the death of the person in whose favour the guarantee is given, his heirs may claim the sum in question.

If the guarantor produces the person guaranteed at the time agreed upon and the person in whose favour the guarantee has been given cannot be found, the guarantor may make application to the Court for the appointment of a representative of such person for the appointment of a representative of such person and for the person guaranteed to be handed over to him.

- 652. In the case of an absolute contract of guarantee, if the debt is payable forthwith by the principal debtor, payment thereof may also be demanded forthwith from the guarantor. If the principal debtor is to make payment at some future definite date, however, payment may only be demanded from the guarantor on that date.

- 653. In the case of a restricted contract of guarantee, payment may be demanded from the guarantor in accordance with the nature of the guarantee, that is to say, whether for immediate payment, or for payment at some future definite date.
- 654. A contract of guarantee may validly be concluded in respect to a debt payable at some future definite date for a period to coincide with such date, and also for a period beyond that date.
- 655. If the creditor postpones his claim in respect to the principal debtor, he is considered to have postponed his claim both in respect to the guarantor and any person guaranteeing him. Any postponement in respect to a first guarantor acts as a postponement of the second guarantor. A postponement in respect to the guarantor, however, does not act as a postponement in respect to the principal debtor.
- 656. If a person who has contracted debts repayable at some future definite date wishes to leave for some other country before such debts fall due for payment, such person must find a guarantor upon creditor applying to the Court to that effect.
- 657. If a person requests another to guarantee a debt which he owes to some third person and such person agrees, and pays the debt, and wishes to exercise his right of recourse against the debtor, he may do so, in respect to what he has guaranteed and not what he has paid. But if he has paid a portion of the debt as a result of a settlement with the creditor, he has a right of recourse in respect to that amount only, and not to the whole debt.

Examples:-

(1). A is a guarantor for sound coin. He pays with base coin. He is entitled to receive sound coin from the principal debtor. On the other hand, if he is guarantor in respect to base coin and pays in sound coin, he is only entitled to receive base coin from the principal debtor.

(2). A is a guarantor for so may piastres and as the result of a settlement pays with goods. A recovers from the principal debtor in cash the amount that he has guaranteed. But if A is guarantor in respect to one thousand piastres and as a result of a settlement pays five hundred piastres, A can only recover five hundred piastres from the principal debtor.

- 658. If any party to a contract based upon consideration deceives another party thereto, such party must make good any loss caused to the other.

Examples:-

(1). A buys a piece of land and erects a building thereon. Thereupon, a person appears who proves to be entitled to such land and takes possession thereof. A is entitled to recover the value of the land from the vendor and in addition the value of the building at the time of handing it over.

(2). A requests certain merchants to sell certain goods to his son, who is a minor, stating that he has given him permission to engage in trade. It is later proved that the boy is the son of some other person. The merchants are entitled to recover the value of the good which they have sold to the boy from A.

CHAPTER III. RELEASE FROM THE CONTRACT OF GUARANTEE.

SECTION I. GENERAL.

- 659. When the subject matter of the guarantee is made over to the person in whose favour the guarantee was made, whether by the principal debtor or the guarantor the guarantor is released from the contract of guarantee.
- 660. If the person in whose favour the guarantee is made informs the guarantor that he has released him from the contract of guarantee, or that he has renounced any rights he may have against him, the guarantor is freed from all liability.
- 661. The release of the guarantor does not bring about the release of the principal debtor.
- 662. The release of the principal debtor from the liability brings about the release of the guarantor.

SECTION II. RELEASE FROM A CONTRACT OF GUARANTEE TO PRODUCE A PARTICULAR PERSON.

- 663. Upon the guarantor producing the person whose appearance was guaranteed to the person in whose favour the guarantee was given in a place where it is possible to take legal proceedings, such as a town or township, he is released from the contract of guarantee, whether such person agrees or not. If it has been stipulated that he shall deliver him in some specified town, however, and delivers him elsewhere, he is not released from the contract of guarantee. If he has agreed to produce him in Court, but hands him over in the street, he is not freed from the contract of guarantee. If he hands him over in presence of a police officer, however, he is released from the guarantee.
- 664. The guarantor is released from the contract of guarantee by simply handing over the person guaranteed when requested to do so. But if he hands over the person guaranteed without being requested to do so, he is not released from the contract unless he states that he is handing him over in pursuance of the contract of guarantee.
- 665. If a person who has guaranteed to produce a certain person on a certain day produces such person before that day, he is released from the contract of guarantee, even though the person in whose favour the contract is given does not agree thereto.
- 666. If the person whose appearance is guaranteed dies, the guarantor is released from the contract of guarantee, and if there is any person guaranteeing the guarantor, he is also released. Again, if the guarantor dies, he is released from the contract of guarantee and any person guaranteeing him is also released from the contract. Should the person in whose favour the guarantee is given die, however, the guarantor is not released from the contract of guarantee, and a claim may be made by such person's heirs.

SECTION III. RELEASE FROM A CONTRACT OF GUARANTEE OF PROPERTY.

- 667. In the event of the death of the creditor, the guarantor is released from the contract of guarantee, should the debtor be the sole heir of the creditor. Should there be some other heir of the debtor, however, the guarantor is only released from the share of the debtor, and not from the share of the other heir.
- 668. In the event of the guarantor or of the principal debtor coming to a settlement with the creditor in respect to a portion of the debt, both of them are released from the contract of guarantee, if a stipulation has been inserted to the effect that both of them or the principal debtor are to be released, or if no condition has been inserted at all. If a condition has been inserted stipulating for the release of the guarantor only, the guarantor alone is freed, and the creditor has the option of claiming the whole of the debt from the principal debtor or of claiming the amount covered by the settlement from the guarantor and the balance from the principal debtor.
- 669. If the guarantor transfers liability in respect to the person in whose favour he has concluded the contract of guarantee to some other person, and both such persons agree thereto, the guarantor and the principal debtor are released from the liability.
- 670. In the event of the death of the guarantor of property, the property guaranteed may be claimed from the guarantor's estate.
- 671. If a person becomes the guarantor for the price of a thing sold and the contract of sale is cancelled or the thing sold is claimed by some person who is entitled thereto or is returned on account of some defect, the guarantor is released from the contract of guarantee.
- 672. If property is taken on hire for a fixed period and some person becomes guarantor for the rent to be paid in respect thereto, the contract of guarantee terminates at the end of such period. Should a fresh contract of hire be concluded in respect to that property, such contract does not include the contract of guarantee.